Roshidan bin Shamsudin (suing by himself and as administrator of the estate of Muhammad Aiman Izzan bin Roshidan, deceased) v Muhammad Saimee bin Che Isa & Anor and another appeal

HIGH COURT (PENANG) — CIVIL APPEAL NOS PA-12B-102–11 OF 2016 AND PA-12B-103–11 OF 2016
AZMI ABDULLAH JC
10 MARCH 2018

Damages — Road accident — Liability — Appeal against decision of sessions court — Differing versions between parties — Version accepted by court — Whether evidence of witnesses admissible — Whether witnesses credible — Whether awards awarded appropriate — Whether excessive — Apportionment of liability

There were two appeals, from the sessions court, pertaining to a road accident that occurred between two motorcycles bearing registration Nos KAF 6286 and PJW 660. There were differing versions as to how the accident occurred. The version of PJW 660 was that KAF 6286 came from the opposite direction, suddenly cutting across his path of way, causing the accident. The version of KAF 6286 was that he was stopping on the road shoulder when PJW 660 suddenly came and crashed into him. According to an eyewitness ('SP5'), he was riding his motorcycle in front of PJW 660, which was two motorcycles ahead. He did not see how the collision took place. However, on hearing a collision, he turned his motorcycle around. He said he avoided KAF 6286 which was ridden without the head light, riding against the flow of traffic. PJW 660, which was behind SP5, collided into KAF 6286. During trial, the investigating officer ('the IO') was called. According to the IO, the small component 'tercampak' while the large ones were found 'di tempat perlanggaran'. The front headlights of both the motorcycles were not damaged. Therefore, the IO concluded that the collision must have occurred on the road shoulder. At the end of the trial, the sessions court judge accepted the plaintiff's version and dismissed the evidence of SP5 and the IO. The sessions court judge attributed liability at 70% on PJW 660 and 30% on KAF 6286. Hence, this appeal.

Held, dismissing appeals:

(1) The version of SP5 lacked credibility. He came from the same *kampung* as the deceased and was told by the deceased's father to be a witness. His

evidence was dubious. If it was true that SP5 witnessed the accident, they why didn't he inform the IO who made the enquiries from those present though this witness was, at this juncture, present at the scene (see para 14).

(2) The evidence of the IO was full of flaws which made the evidence not reliable for full consideration. He essentially agreed to the damage alone and nothing more and he could not say on which part of the road the collision occurred. It would not be possible to determine, from the damage to the motorcycles, to indicate that KAF 6286 was traveling against the flow of traffic. Furthermore, the investigation was carried out under the Criminal Procedure Code but no investigation diary was prepared (see para 16).

(3) The awards awarded by the sessions court judge commensurated with the injuries sustained, as reflected in the medical reports and they were not substantially higher than the actual submitted figures presented by the defendant. In fact, for both appeals, the awards were within the range of the submissions made by the parties and the figures awarded were not awards that escalated or depreciated inordinately. The loss of future earnings based on the sum of RM850 per month was definitely reasonable as it was made in consideration of the earnings being RM1,200 per month before the accident with the plaintiff now only earning RM350 per month (see para 56).

[Bahasa Malaysia summary

Terdapat dua rayuan, dari mahkamah sesyen, berkenaan kemalangan jalanraya yang berlaku antara dua motosikal dengan nombor pendaftaran KAF 6286 dan PJW 660. Terdapat dua versi bercanggah tentang bagaimana kemalangan ini berlaku. Versi PJW 660 adalah bahawa KAF 6286 datang dari arah bertentangan, dengan tiba-tiba memotong jalannya, menyebabkan kemalangan. Versi KAF 6286 adalah bahawa dia berhenti di bahu jalan apabila PJW 660 tiba-tiba keluar dan melanggarnya. Menurut saksi mata ('SP5'), dia menunggang motosikal di hadapan PJW 660, yang dua motosikal di hadapan. Dia tidak dapat melihat bagaimana pelanggaran ini berlaku. Walau bagaimanapun, selepas mendengar pelanggaran tersebut, dia memusing basikalnya ke belakang. Menurut SP5, dia mengelakkan KAF 6286 tang ditunggang tanpa lampu, melawan arus trafik. PJW 660, yang berada di belakang SP5 berlanggar dengan KAF 6286. Semasa perbicaraan, pegawai penyiasat ('IO') dipanggil. Menurut IO, komponen kecil tercampak manakala yang besar dijumpai di tempat pelanggaran. Lampu hadapan kedua-dua motosikal tidak rosak. Oleh itu, IO menyimpulkan bahawa pelanggaran semestinya berlaku di bahu jalan. Pada penutup perbicaraan, hakim mahkamah sesyen menerima versi plaintif dan menolak keterangan SP5 dan

IO. Hakim mahkamah sesyen meletakkan liabiliti 10% pada PJW 660 dan 30% pada KAF 6286. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan-rayuan:

(1) Versi SP5 tidak kredibel. Dia datang dari kampung yang sama dengan si mati dan diberitahu oleh bapa si mati untuk menjadi saksi. Keterangannya diragui. Jika benar bahawa SP5 menyaksi kemalangan tersebut, kenapakah dia tidak memaklumkan IO yang membuat pertanyaan kepada semua yang hadir sedangkan saksi ini, pada waktu ini, hadir di tempat kejadian (lihat perenggan 14).

(2) Keterangan IO penuh kecacatan yang menjadikan keterangannya tidak boleh diterima untuk dijadikan pertimbangan penuh. Dia, secara asasnya, bersetuju dengan kerosakan sahaja dan tidak lebih dan dia tidak memberi keterangan tentang bahagian mana pelanggaran tersebut berlaku. Tidak mungkin untuk menentukan, berdasarkan kerosakan pada motosikal untuk menunjukkan KAF 6286 menunggang melawan arah trafik. Tambahan lagi, siasatan dijalankan bawah Kanun Tatacara Jenayah tetapi diari siasatan tidak disediakan (lihat perenggan 16).

(3) Award-award yang diawardkan oleh hakim mahkamah sesyen berpatutan dengan kecederaan yang dialami, seperti yang ditunjukkan dalam laporan perubatan dan kesemuanya tidak terlalu tinggi daripada angka yang dikemukakan oleh defendan. Malah, bagi kedua-dua rayuan, award adalah dalam rangkuman yang dihujahkan oleh pihak-pihak dan angka yang diawardkan bukanlah award yang naik atau turun mendadak. Kerugian pendapatan masa hadapan berdasarkan jumlah RM850 sebulan adalah munasabah kerana dibuat dengan mempertimbangkan pendapatan sebanyak RM1,200 sebulan sebelum kemalangan dengan plaintiff yang hanya berpendapatan RM350 sebulan (lihat perenggan 56).]

Notes

For cases on road accident in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 419–420.

Cases referred to

Chock Kek Ling v Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120 (refd)
Hang Jong Juan v Tan Yeo Soon [1986] 2 MLJ 5, CA (refd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)

A *Khoon Chye Hin v PP* [1961] 1 MLJ 105b, CA (refd)
Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors [1984] 1 MLJ 237, FC (refd)
Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor [2000] 7 MLJ 24; [2001] AMR 3445, HC (refd)
B *Noor Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor* [1991] MLJU 10; [1991] 1 CLJ 150, HC (refd)
PP v Mohammad Ali [1962] 1 MLJ 257 (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
C *Tan Cheong Poh & Anor v Teoh Ah Kew* [1995] 3 MLJ 89, CA (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] CLJ Rep 323, FC (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Tua Kin Ling v PP [1970] 2 MLJ 61 (refd)
D *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237, FC (refd)

Legislation referred to

Criminal Procedure Code

E *Imavathi Subramaniam (Imavathi & Co) in Civil Appeal No PA-12B-102–11 of 2016 for the appellant.*
Pamela Vijayrani (Noraishah Ismail Pamela Vijayrani & Co) in Civil Appeal PA-12B-103–11 of 2016 for the appellant.
Yahaya bin Hashim (Yahaya & Partners) in Civil Appeal No PA-12B-102–11 of
F *2016 for the respondent.*
Hema Malini (K Suganth & Co) in Civil Appeal No PA-12B-103–11 of 2016 for the respondent.

Azmi Abdullah JC:

G

INTRODUCTION

[1] The two appeals are pertaining to a road accident that occurred on 18 August 2012 between two motorcycles being KAF 6286 ridden by
H Muhammad Saimee bin Che lsa and motorcycle PJW 660 ridden by Muhammad Aiman lzzan bin Roshidan. The suits before the sessions court involve a cross claim that involves two suits being heard together whereby both parties instituted actions against each other in claiming compensation for causing the accident. Muhammad Aiman lzzan bin Roshidan however passed
I away on 17 May 2015 hence the action is pursued by his father as the legal representative.

[2] The learned sessions court judge attributed liability at 70% on motorcycle PJW 660 (plaintiff in Suit No A53KJ-47–08 of 2013/defendant in Suit No A53KJ-88–10 of 2013) and 30% on motorcycle KAF 6286 (plaintiff in Suit No A53KJ-88–10 of 2013/defendant in Suit No A53KJ-47–08 of 2013). Both suits were consolidated and tried together with the learned sessions court judge delivering his decision on 13 October 2016.

[3] The same party ie the representative of rider of motorcycle PJW 660 being the plaintiff in Suit No A53KJ-47–07 of 2013 has lodged an Appeal No PA-12B-103–11 of 2016 against the decisions on liability and quantum made by the learned sessions court judge with the same party being the defendant in Suit No A53KJ-88–10 of 2013 has lodged an Appeal No 12B-102–11 of 2016 also against the findings on liability and quantum. Both appeals were consolidated and heard together.

[4] This court on 11 January 2018, after perusing the written submissions of all four counsels and further oral clarifications, decided to dismiss both appeals on the issues of liability and quantum. Aggrieved by the findings of this court, further appeals have been lodged to the Court of Appeal hence these grounds for decision. For ease of reference the parties will be referred according to their motorcycle plate numbers (PJW 660 and KAF 6286) in this elaboration on the findings made.

BRIEF FACTS OF THE CASE

[5] As is quite the norm in accident cases, there are differing versions as to how the accident occurred. The version of PJW 660 is that KAF 6286 coming from the opposite direction suddenly cut across his path of way hence causing the accident This version is gathered from the testimony of SP5, his friend who was there at the time of the accident but the rider of PJW 660 himself did not lodge a police report. Having passed away before the trial, his evidence could not be obtained at trial pertaining to how the accident occurred.

[6] The version of KAF 6286 is that he was stopping on the road shoulder between K–L as shown in the sketch plan and nearing a meat stall when PJW 660 suddenly came and crashed into him.

[7] The learned sessions court judge decided that the accident occurred between K–L being on the road shoulder in accordance with the version of KAF 6286. The learned sessions court judge made a finding of fact that KAF 6286 has crossed the road and was on the road shoulder, nearing the meat stall when PJW 660 came and collided into him. The evidences of SP5 and the

investigating officer were given scant reliance by the learned sessions court judge for reasons that will be elaborated in subsequent paragraphs.

GOVERNING PRINCIPLES

[8] This court would like to revisit the principles of appeals before delving further into the main issues of this appeal. The case of *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 has had the Federal Court observing that:

> A court of appeal always starts with the working presumption that any decision appealed against is right in every aspect. So to succeed in an appeal the appellant must convince us that the decision appealed from is wrong. If we are not so convinced, the appeal fails.

[9] The Federal Court in the precedent of *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237 has stated:

> The learned judge in this case had the advantage of seeing and hearing the witnesses which opportunity the appellate court did not enjoy and there was no reason in this case for the appellate court to interfere in the case.

[10] The Court of Appeal case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 has enunciated that:

> It is trite law that an appellate court will not readily intet1ere with the findings of fact arrived by the trial court to which the law entrusts the primary task of evaluation of the evidence.

[11] It is apparent from these cases that the court in exercising its appellate jurisdiction should exercise restraint from interfering against the decisions of the court of first instance as the trial judge would have the benefit of seeing the conduct and demeanour of witnesses whilst giving evidence and especially when faced with being interrogated by counsels during cross examination. There must be very substantive misdirection of facts and law before it would give merit to any such interference from the court sitting on appeal.

DELIBERATIONS OF THE HIGH COURT ON LIABILITY

Eyewitness evidence

[12] According to the eyewitness (SP5), on the fateful night *he was riding his motorcycle in front PJW 660 being about two motorcycles ahead.* He did not see how the collision took place, however on hearing a collision he turned his motorcycle around. During examination-in-chief he stated:

Q: Di laluan mana pertembungan tersebut? A

A: L–M

He said he avoided motorcycle KAF 6286 which was ridden without the head light riding against the flow of traffic. The motorcycle PJW 660 which was behind him was collided into by motorcycle KAF 6286. B

[13] His evidence had been rejected by the learned sessions court judge for the following reasons:

(a) he reported the accident 22 months later; C

(b) in his police report he said that he saw the accident however under cross-examination he admitted that he did not see how the accident occurred;

(c) he was a kampung friend of the deceased rider of PJW 660 and had been late in lodging his police report without giving any reason; and D

(d) no written police statement was recorded from the witness. The learned sessions court judge accepted the evidence of this witness only as to the direction of the vehicles, not pertaining to the encroachment and the riding against the flow of traffic allegedly made by KAF 6286. E

[14] This court does find that the version of this witness lacks credibility for these reasons:

(a) he came from the same kampung as the deceased. He was told by the deceased's father to be a witness; F

(b) his evidence was dubious. If it was true that SP5 witnessed the accident, then why didn't he inform the investigation officer who made enquiries from those present though this witness was at this juncture present at the scene. In answer to questions put forward by the counsel for KAF 6286 he answered: G

Q: Selepas kemalangan apa jadi?

A: Saya call ambulance

Q: Siapa lagi kamu call H

A: Panggil kawan yang duduk dekat rumah dia

Q: Selepas ambulan bawa Aiman kamu di mana?

A: Di situ sehingga motorsikal di angkat I

SJN Ismail B Ahmad (SP1) gave evidence:

Q: Ada buat temubual di tempat kejadian?

A: Ada tetapi tidak ada sesiapa yang Nampak. Mereka ada dekat tempat kejadian.

Q: Kenderaan di alihkan atau tidak?

A: Tidak

The reason given by (SP5) that he 'kalut dengan Aiman' is to my mind an evasive reason since the victim had already been taken to Hospital by an ambulance.

Evidence of investigating officer

[15] The evidence of the investigating officer was full of flaws which makes the evidence not reliable for full consideration. He insisted that the accident occurred in Lane L–M upon the story related by SP5 and what he ascertained at the scene and the damage to the motorcycles.

(a) the learned sessions judge rejected the evidence of SP5 and therefore the evidence for PJW 660 is therefore unsupported.

(b) scratch marks supposedly caused by motorcycle KAF 6286 was not shown in the photograph. The investigation officer though at first said that it was caused by the motorcycle KAF 6286 was not sure under cross-examination. The investigation officer's evidence on 2 May 2014 was:

Q: H-A1 calar motorsikal mana?

A: KAF 6286

Bermula dari H-H?

Q: Ada gambar di ambil untuk H-H7?

A: Tidak

Re-examination by Ms. lmavathy (counsel for PJW 660)

Q: L-M tempat perlanggaran?

A: Ya. Berdasarkan kesan calar dan serpihan

Evidence on 26.05.2014 was:

Q: Kamu tidak akan tahu kesan calar permukaan?

A: Ya

Q: Saimee dalam reportnya kata dia tidak lawan arus?

A: Ya

Q: Kamu kata dia lawan arus berpandukan keterangan lisan saksi (SP5)?

A: Ya. Juga kedudukan motosikal

Q: Kamu tidak pakai keterangan Saimee yang dia tidak lawan arus?

A: Ya

Q: Serpihan kecil boleh ternampak?

A: Ya

Q: Serpihan besar?

A: Masih di tempat perlanggaran

Q: Rujuk gambar (P3A-P3A) gambar D,E,H serpihan masih di bawah motorcycle?

A: Ya

[16] He essentially agreed in accordance to the damage alone and nothing more and he could not say on which part of the road the collision occurred. This court finds that it would not be possible to determine from the damage to the motorcycles to indicate that the motorcycle KAF 6286 was travelling against the flow of traffic. A written statement was recorded from SPS but the SP1 refused to divulge this fact. The investigation was carried out under the Criminal Procedure Code but no investigation diary was prepared.

[17] Damage to motorcycle KAF 6286:

(a) Sayap angin kiri pecah dari atas hingga bawah
(b) Raga kemek di kiri
(c) Cover hon depan pecah di kiri
(d) Cover enjin kiri retak
(e) Pemijak kaki hadapan kiri bengkok ke belakang
(f) Cover handle pecah di bahagian tengah dan kiri
(g) Handle kiri bengkok ke atas
(h) Signal hadapan kiri pecah
(i) Absorber kiri belakang pecah

[18] Damage to motorcycle PJW 660:

(a) Cover hon depan pecah kiri

(b) Fok kiri kanan bengkok sedikit

(c) Sayap angin kiri terkopak ke belakang

(d) Cover handle pecah

(e) Lampu besar hadapan renggang

(f) Calar kiri pada mud guard hadapan

(g) Cover enjin kiri retak

(h) Cover bateri kiri retak

(i) Mud guard belakang bengkok ke kanan

[19] The learned sessions court judge rejected the evidence of the investigation officer after putting it under careful scrutiny. The learned judge found the investigation officer to be biased in the investigation. The sergeant issued a police summons against the KAF 6286 even though no statement was recorded from supposed independent witness SP5. Furthermore, the investigation paper was not even registered. A summons issued by the sergeant can only be taken as evidence against KAF 6286 if he had admitted to the charge. In this case the sergeant did not even know what had happened to the summons. The learned judge refused to rely on the evidence of the sergeant as to how the accident had taken place. This court thus does find that the evidence of the investigating officer was dubious to say the least.

[20] The unreliability of his evidence can be gathered from the evidence given by him:

(a) photographs showed no scratch mark even though the photos were clear. However, he still drew the scratch mark in the sketch plan;

(b) he did not know where the scratch mark started and where it ended but he said in his initial evidence that it was caused by the motorcycle KAF 6286;

(c) he said the large broken pieces found in lane L–M and the small pieces were flung away but the silent evidence of the photographs show that the large broken pieces were under the motorcycle KAF 6286 in lane K–L. In the photograph only few small pieces could be seen in lane L–M; and

(d) he recorded the statement of KAF 6286 who stated that he did not ride against the flow of traffic but he instead accepted the version of SP5 whose statement was not even recorded. It is certainly odd to accept the witness' story who only made a police report 22 months after the accident.

[21] This court finds that the learned sessions court judge was correct in not

relying on the evidence of the sergeant. In the case of *Public Prosecutor v Mohammad Ali* [1962] 1 MLJ 257 Thomson CJ said 'when a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted but if the says he saw a cow wondering along one of the lain streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted'.

[22] In *Tua Kin Ling v Public Prosecutor* [1970] 2 MLJ 61 at p 63 Thompson CJ 'No doubt the rule is that if a witness had lied on one, or two points it does not necessarily follow that his whole evidence should be rejected (*Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b). But it is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted'.

[23] The learned sessions court judge accepted the evidence of the KAF 6286. He found the plaintiff's evidence to be consistent. In short the learned judge believed the plaintiff. Since the findings of the sessions court judge is a finding of fact, this court should exercise extreme caution from disturbing the decision.

[24] The investigation officer in his evidence said that the small component 'tercampak', whereas the large ones were found 'di tempat perlanggaran'. The front headlights of both the motorcycles were not damaged. Details of damage to both motorcycles have been listed above. The components found at the scene were plastic parts. The larger ones can be seen under the motorcycle KAF 6286 in photographs in the record of appeal. Hence, the collision must have occurred on the road shoulder. The sessions court judge refused to rely on the investigation officer's evidence and therefore, he seemed to have rejected the content of the sketch plan though the learned judge did not actually state so. The scratch marks could not have been there since the photographic evidence available before the learned sessions court judge did not show such marks. Even if the scratch marks were taken into consideration it would not support any party's version since the sergeant did not know which motorcycles had caused such marks.

Absence of material fact in police report

[25] The rider of KAF 6286 had failed to state in his police report that he had

crossed the road and was on the side table and in the process of stopping in front of the meat stall when he was collided into. The failure by the KAF 6286 to state such fact, did not in any way have a bearing on the case since the pleading of PJW 660 and contention was that KAF 6286 was riding on the road proper on the lawful right of way of PJW 660 against the flow of traffic and not that the collision had occurred while KAF 6286 was cutting across the road. Had the collision occurred whilst KAF 6286 was crossing the road then it would have been fatal for him not to state such a fact in his report.

[26] In the case of *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 the fourth defendant had failed to state in his report the existence of a heap of gravel on the road. However, the fourth defendant and the second defendant admitted the presence of such gravel. Raja Azlan Shah J (as he then was) said 'I found as a fact that there was this heap of gravel on the road as was told to us by the second defendant as well as the fourth defendant. Mr Keith Sellar has attacked the report lodged in which the fourth defendant had failed to mention that fact ... His client has admitted in evidence that there was this heap of gravel, so there was'. In this appeal, the rider of KAF 6286 had failed to state in his report that he had crossed the road but admitted that he had crossed the road which is similar to the case of *Chock Kek Ling* where the fourth defendant had failed to state the presence of a heap of gravel. The plaintiff's failure to state such fact is not fatal. It should also be borne in mind that the rider of KAF 6286 was still on a stretcher then. It could have been an oversight by him. He did say in his evidence in court that his report was lacking in details (*tidak terperinci*).

[27] On the issue that the rider of KAF 6286 had failed to state he reduced the speed and was going to park at the meat stall and had stopped to park when the collision occurred and he was collided into on the left this court finds that whatever that has been stated in the police report of KAF 6286 encompassed all the facts required to be stated although 'tidak terperinci'.

[28] The counsel for PJW 660 had submitted that the rider of KAF 6286 had contradicted himself by saying the deceased's (PJW 660) 'motorsikal datang dari arah hadapan' and also 'motosikal plaintiff datang dari arah bertentangan'. Even though the rider of KAF 6286 admitted the words had different meanings, this court finds that this is splitting hairs on words used. The case of *Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor* [2000] 7 MLJ 24; [2001] AMR 3445 at p 3456 is referred.

[29] The evidence of the KAF 6286 that the accident was in Line L–M under cross-examination by counsel for PJW 660 must not be read in isolation of his

other evidence. His further evidence under cross-examination as below must be taken together in which he reiterated that the accident occurred between K–L:

Q: Motosikal kamu jalan perlahan melawan arus?

A: Ya arah bertentangan

Q: kamu tidak boleh melawan arus?

A: Tidak setuju. Saya tunggang di K-L untuk berhenti

Q: Seharusnya kamu tidak boleh tunggang di Iorang K-L ianya untuk kenderaan berhenti.

A: Tidak setuju

Q: Tanda 'Y' tempat perlanggaran

A: Y berhampiran H1

(Note: Rider KAF 6286 marked 'Y' on the sketch plan as a point of impact)

Q: Kemalangan ini berlaku di gigi jalan 'L'?

A: Tidak setuju

Under Re-Examination

Q: Kamu cross pergi mana?

A: cross sebelum tiang ke bahu jalan

Q: Kamu di langgar di Iorang L-M?

A: Tidak. Di Iorang K-L. Saya rasa. Saya dok disitu dah sebelum kemalangan.

[30] The rider of KAF 6286 marked the point of impact as 'Y' in the sketch plan and it is somewhere in front of the meat stall. The sketch plan was not drawn according to scale hence it cannot be said that his evidence is not consistent with the sketch plan and photographs.

[31] The damage to both vehicles would only show glancing blow from the opposite directions

[32] In this appeal the issue of the rider of KAF 6286 having been summoned under rule 10 is not of consideration. The investigating officer's evidence was deemed to be biased that it was rejected by the session court judge. This court agrees that it was unfounded for the investigating officer to summon the rider of KAF 6286.

[33] The sargeant in his evidence under cross-examination by counsel of KAF 6286 stated that 'saya kata dia lawan arus berpandukan pada keterangan lisan saksi SP5 dan kedudukan motosikal. However, the position of the motorcycle did not show the motorcycle was driven against the flow of traffic. The Sargeant also relied on the evidence of SP5 as proof that the plaintiff rode against the flow of traffic. SP5 had been challenged. There was therefore of no necessity for the investigating officer's evidence to be challenged since he was relying on the evidence of SP5. The case of *Noor Azahar bin Habin v Rajaswari a/p Sithampara Pillai & Anor* [1991] MLJU 10; [1991] 1 CLJ 150 quoted *Phipson on Evidence* where it was stated that it would be unnecessary to challenge a witness evidence in these situations: (1) where the story is incredible; and (2) where several witness are called to the same point then it is not always necessary to cross examine.

[34] Upon all these considerations and the principle that the trial judge would be the best at analysing the demeanour of the witnesses upon seeing and hearing their evidence at trial especially under cross examination, this court does not find that there has been any misdirection of fact and law in the apportionment of liability as decided by the learned sessions court judge.

DELIBERATIONS ON QUANTUM

General damages

[35] The law is clear when it comes to determining damages as decided in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885, the Federal Court decided:

> It is trite that damages serve as compensation, not reward, less still a punishment (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324). In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence.

[36] The principles for overturning awards on quantum are numerous. In the case of *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214, the Federal Court has observed that:

> On an appeal against the damages awarded, the appellant had to convince the appellate court that the learned trial judge had acted on a wrong principle of law or had misapprehended the facts or had for other reasons made a wholly erroneous estimate of the damage suffered.

[37] In the case of *Tan Cheong Poh & Anor v Teoh Ah Kew* [1995] 3 MLJ 89 wherein it was held by the Court of Appeal and quoted that:

It is trite that the appellate court should not give preference to its own figure simply because they disagree with the figure arrived at by the trial judge; it will only intetiere if it is satisfied that *the judge has acted on a wrong principle of law* or has for other reasons made a wholly erroneous estimate of the damage suffered.

[38] In *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] CLJ Rep 323 wherein it was held by the Federal Court that:

The principle that should guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge.

[39] In *Topaiwah v Salleh* [1968] 1 MLJ 284 wherein it was held by the Federal Court that:

In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that *the judge acted on some wrong principle of law*, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the Federal Court will follow in the light of the special facts of each particular case.

[40] In the case of *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 it was decided by the Federal Court:

An appellate court can only interfere with an assessment if it is considered *inordinately low or inordinately high* or if it is so much out of line with the discernible pattern of awards in reasonably comparable case that it might be regarded as a wholly erroneous estimate.

[41] The Court of Appeal in *Hang Jong Juan v Tan Yeo Soon* [1986] 2 MLJ 5 held:

In an appeal against the quantum of damages, it is settled law that the onus on the appellant is a heavy one and *it must be established plainly that the trial judge's award was a wholly erroneous estimate.*

APPEAL NO PA-128–102–11 OF 2016 (A53KJ-88–10 OF 2013)

[42] In this appeal the awards granted by the learned sessions court judge to the rider of KAF 6286 are as follows:

(a) head injury — RM60,000;

(b) facial bone fracture — RM60,000;

(c) eyes injury — RM25,000;

(d) open comminuted fracture supracondylar left femur (with shortening of 3.4 cm) — RM50,000;

(e) open comminuted fracture midshaft left tibia and fibula — RM35,000;

(f) closed fracture distal end of left radius — RM20,000;

(g) fracture of left first metacarpal bone — RM4,000;

(h) osteoarthritis of left knee joint — RM4,000;

(i) skin grafting — RM10,000;

(j) degloving injury/ multiple laceration — RM15,000;

(k) scars — RM15,000;

(l) pain and suffering (future operation for removal of implant) — RM5,000 (without interest); and

(m) renewal plating — RM2,000 (without interest).

[43] The defendant counsel argues however that the awards are manifestly excessive pertaining to items (a), (c), (d), (f), (g), (h), (i), (j) and (I). Her submissions are:

RM40,000 for the head injury

RM20,000 for the eyes injury

RM40,000 for the femur fracture

RM15,000 for the radius fracture

RM3,000 for the metacarpal bone fracture RM3,000 for the osteoarthritis

RM10,000 for the skin grafting and degloving injury RM3,000 for pain and suffering.

[44] This court finds that the awards commensurate with the injuries sustained as reflected in the medical reports and they are not substantially

higher than the actual submitted figures presented by the defendant counsel. This court decides that the interference by the appeal court need not be exercised.

Nursing care

[45] The award is RM9,600 on the multiplicand of RM800 per month for a duration of 12 months. The accident occurred on 18 August 2012 and the rider of KAF 6286 certainly sustained very serious injuries which needed him being taken care of by members of his family hence the award of the learned sessions court is most reasonable in the circumstances of the injuries sustained.

Initial award	:	RM314,600
Less 10% overlapping for items no b, c, d, e	:	RM17,000
Total award	:	RM297,600

Loss of earnings

[46] The learned sessions court judge made these awards:

(1) RM48,000 for loss of earnings on the multiplicand of RM1,200 per month, for a duration of 40 months from February 2013 to May 2016; and

(2) RM124,100 for loss of future earnings (without interest) using a multiplier of 16 years (192 months) since he was 30 at the time of accident minus 46 months arriving at 146 months. The loss of future earnings thus uses the multiplicand of RM850 per month and the multiplier of 146 months hence the award of RM124,100.

[47] This court finds this award reasonable as the rider of KAF 6286 was earning RM1,200 at the time of accident according to his employer who gave evidence (SP9). It is also evidenced that he earns only RM350 per month when the trial commenced. This court is fully convinced and satisfied that the learned sessions court judge has made the awards without any misappreciation of facts and law and this court in exercising its appellate jurisdiction decides not to interfere with the awards made.

APPEAL NO PA-128–103–11 OF 2016 (A53KJ-47–08 OF 2013)

[48] The awards for the rider of PJW 660 are appealed against pertaining to the general damages awarded upon perusing the amended memorandum of appeal items 14–20 and not to the percentage of deduction made due him passing away before the trial. Counsel for PJW 660 insists that the awards are too low. The breakdown is reproduced to reflect the submissions made by counsels and the decision of the learned sessions court judge.

[49] This court finds the awards are very much within what have been submitted and certainly not manifestly low hence upon the principles in the precedents quoted, decides not to interfere with awards made.

	General damages:			
	Injuries	Plaintiffs submission	Defendants submission	Sessions court decision
1	Brain injur that caused plaintiff to be vegetative state Cerebral concussion with GCS 5/15 due to subdural haemorrhage, bilateral occipital and parietal encephalomalacia and generalised cerebral oedema, post traumatic epilepsy risk, vegetative state, absent gag reflex, bladder and bowel incontinence	RM5,000 RM350,000	RM200,000	RM250,000
2	Fracture of facial bones nasal bone, nasal septum, all walls of maxillary sinuses bilaterally, ethmoid bones, lateral and medial walls of both orbits, both zygomatic arches, bilateral temporomandibular joint dislocation with fractures of mandibular condyles, Fracture of the hard palate with deformity of the jaw and bleeding from the mouth Right nose bleed	RM50,000 RM15,000 RM5,000	RM40,000	RM60,000
3	Bilateral periorbital haematoma	RM6,000	RM5,000	RM5,000

4	Multiple laceration wound over the nose, laceration wound over the left forehead, laceration wound at the right labial sulcus, laceration wound over the left leg.	RM10,000	RM4,000	RM7,000
5	Chest injury bilateral lung contusion, bilateral hydropneumothorax, right sided emphyema thoracis and bilateral pneumonia and aspiration pneumonia	RM40 ,000	RM19,000	RM30,000
6	Fracture left tibia and fibula	RM50,000	RM22 ,000	RM35,000
7	Multiple bedsores and Scars	RM80,000	RM15,000	RM30,000
	TOTAL	RM656,000	RM305,000	RM417,000
	For shortened pain and suffering as deceased plaintiff succumbed to his injuries 33 months after the accident	Should not be allowed or in the alternative to deduct 1/3 from total general damages	To deduct 70% from total general damages ie to award 30% of the total general damages	To deduct 50% from total general damages ie awarding 50% of the total general damages = RM208,150

CONCLUSION

[50] The law is clear that an appellate court should be very careful in exercising its discretion to interfere with the findings of fact of the court of first instance. This court after a careful perusal of the notes of evidence finds the decision of the learned sessions court judge is very much a decision based on findings of fact and the learned sessions court judge would be in the best position to have a view of the demeanour of the witnesses in arriving at its decision.

[51] This court agrees with the learned sessions court judge that the evidence of SP5 is not reliable as he was riding in front of where the accident occurred and could not have actually seen how it happened. The fact that his police report is lodged after a two year lapse lends little credibility to his evidence as it could be embellished with additional facts and the fact that he didn't lodge a report immediately works against his evidence being given much credibility. There was in fact no statement recorded of his supposed viewing of the accident when his memory was still fresh and reliable.

[52] As regards the investigating officer, this court has no reason to depart from the observations of the learned sessions court judge that his investigation was very much flawed and his reliance on the input of the SP5 is without credibility.

[53] This court accepts the evidence of the rider of motorcycle KAF 6268 that the collision occurred between K and L and the mere fact that he did not mention crossing the road in his police report cannot be used to view his evidence suspiciously as a police report is not supposed to contain every single detail of an occurrence.

[54] This court on the issue of liability thus decides against interfering with the apportionment of liability as decided by the learned sessions court. No apparent misappreciation of fact has occurred. Though the judgment is rather brief but the pertinent observations have been made and correctly appreciated.

[55] For appeal PA-128–102–11 of 2016 again, this court views that the awards made to be reasonable and not manifestly excessive. In fact, for both appeals, the awards are within the range of the submissions made by the respective counsels and the figures awarded are not awards that escalates or depreciates inordinately in excess of or being wayward figures.

[56] For appeal PA-128–102–11 of 2016, the loss of future earnings based on the sum of RM850 per month is definitely reasonable as it is made in consideration of the earnings being RM1,200 per month before the accident with the plaintiff now only earning RM350 per month.

[57] For appeal no PA-128–103–11 of 2016 this court after a careful perusal of each item, as awarded finds the awards not to be manifestly low and shall not interfere with the awards made.

[58] Both appeals are thus dismissed with costs.

Appeals dismissed with costs.

Reported by Afiq Mohamad Noor